No. 91-2086

IN THE

Supreme Court of The United States

OCTOBER TERM, 1991

GRANITE STATE INSURANCE COMPANY,
Petitioner,

v.

TANDY CORPORATION AND
T. C. ELECTRONICS (KOREA) LTD.,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Under either de novo review or an abuse of discretion standard, was the district court's stay order proper in a declaratory judgment action in which parallel state proceedings were pending?

II. If the *Colorado River* and *Moses Cone* standards for absention were applied to the district court's stay order, would the stay have been proper?

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The respondents, Tandy Corporation and T. C. Electronics (Korea), Ltd.,[1] respectfully ask that the Court deny petitioner's request for a writ of certiorari to review the judgment and opinion

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[1] T. C. Electronics (Korea), Ltd., is a wholly owned subsidiary of Tandy Corporation. Tandy Corporation has no subsidiaries other than those that are wholly owned. The following joint ventures are partially owned by Tandy Corporation or one of its wholly owned subsidiaries: PTCC, Inc.; Radio Shack de Mexico, S.A. de C.V.; Tandy Electronics (China) Ltd.; Tandy Mobira Communications Corp.; Tandy/Rank Video; and TNC Co. Tandy owns the following partnership: 200 Houston Street Associates.

of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 30, 1992.

STATEMENT OF THE CASE

Granite State's statement of the case is misleading. For this reason, Tandy submits the following.

This petition arises from an order staying federal declaratory judgment proceedings pending resolution of a state court action. (R.I, 196). The underlying suits arise from Granite State Insurance Company's coverage dispute with its insureds, Tandy Corporation and T. C. Electronics (Korea) Ltd. (R.II, 122).

In early 1989, Alexander & Alexander ("A & A"), acting as Tandy's agent (R.II, 112), began negotiations with American International Marine Agency, Inc. ("AIMA"), the underwriting agent for Granite State. (R.II, 144). Tandy was not involved in any direct negotiations with either AIMA or Granite State. A & A sought replacement coverage for Tandy's global marine insurance policy, which covered, among other things, inventory, raw materials, work in process, and finished goods located in Tandy's plant in M´ısan, Korea. Ultimately, Granite State was awarded the contract and coverage began in June 1989. (R.II, 146).

In the spring of 1989, Tandy began experiencing labor problems at the Masan plant, which culminated with the strikers taking control of the plant in late 1989. The police stormed the plant, arrested 21 strikers, and restored possession to Tandy in December, 1989. (R.I, 209). Tandy first became aware of damage at the Masan plant upon its entry into the Masan plant under the protection of the Korean police. Tandy's coverage claims are based on these events. None of its claims relate to any maritime provisions in the insurance policy.

Shortly after it became aware of the damage, on January 12, 1990, Tandy's agent, A & A, gave Granite State's claims agent, AI Marine Adjusters, Inc., notice of a potential claim for losses sustained from rioting workers. AI responded by sending Tandy a reservation of rights letter and requesting additional information. (R.II, 175).

Tandy produced tens of thousands of documents to Granite State. Adjusters and accountants representing American International Underwriters companies spent weeks in the Far East investigating the loss. At all times, Tandy fully cooperated with Granite State's investigation. Negotiations and exchanges of information were ongoing. Throughout the spring and summer of 1990, Tandy operated under the belief that Granite State was in the process of working out its claim.

Ultimately, in November 1990, Tandy submitted to Granite State a sworn statement of proof of loss for the policy limits of $10 million. (R.II, 43, 186). Under the terms of Tandy's policy with the insurance company, Granite State was obligated to make payment within 30 days after submission of Tandy's proof of loss. Granite State did not pay the claim; Granite State did not deny the claim. Instead, 10 days after Tandy submitted its proof of loss, in a race to the courthouse, Granite State filed an action for declaratory relief on January 25, 1991 in the United States District Court for the Southern District of Texas, Houston Division. (R.II, 122).

After learning through the filing of this suit that Granite State was disputing coverage, Tandy Corporation and T. C. Electronics (Korea) Ltd., on February 15, 1991 filed suit against Granite State in Tarrant County, Texas state district court. In the state district court suit, Tandy joined additional parties: Tandy's insurance agent A & A, and Tandy's previous insurer Utica Insurance Company. (R.II, 99). Tandy later amended its state court petition to include as additional defendants AI Marine

Adjusters, Inc., Insurance Company of the State of Pennsylvania, and American International Underwriters Corporation.

In the federal case, Tandy answered Granite State's complaint and filed a motion asking the court to decline to exercise its discretionary jurisdiction over actions for declaratory relief, and dismiss or stay the federal suit until the state district court action was resolved. (R.II, 99, 109). The resulting stay order is the subject of Granite State's petition.

SUMMARY OF ARGUMENT

Regardless of whether the circuit court applied an abuse of discretion standard or reviewed the case *de novo*, it would have reached the same result: the district court properly abstained from hearing the declaratory judgment action pending a parallel state court proceeding. Granite State sought to forum shop this case, which is based on state law and for which the federal forum would not dispose of all the issues and parties.

The Fifth Circuit also held that the *Colorado River* and *Moses Cone* factors, which determine whether a federal court should abstain, do not apply to declaratory judgments. However, even applying those factors to this case, the stay order was proper.

ARGUMENT

The decision of the court of appeals is correct in affirming the district court's stay of federal proceedings pending determination of parallel state court proceedings. Further, there is no meaningful conflict between the decision of the Fifth Circuit and cases from other circuits, including those cited by Granite State. There is no basis for review of this case by this Court.

I. Under either abuse of discretion or de novo review, the district court's stay would be upheld under cases reviewing abstention in declaratory judgment actions.

Granite State initially complains of the failure of the Fifth Circuit to review the district court's decision to stay under an abuse of discretion standard rather than by *de novo* review. Yet, all of the circuits would have upheld the stay order regardless of the standard of review used.

This is an insurance dispute governed by issues of state law.[2] (Order at 4; R. I. 199). In addition, Granite State was forum shopping when it filed the federal suit. It did not deny coverage until after it had filed the declaratory judgment action and, because of the tenor of the parties' relations during the investigation, there can be no dispute that Granite State expected Tandy to file suit if the claims were denied. Finally, the federal suit would be duplicative because it would not resolve disputes with other parties; the state claim potentially would resolve disputes with all the parties. Review of these factors by de novo review rather than with an abuse of discretion standard would not change the result.

The appellate courts, including many of those cited by Granite State, frequently rely on *Brillhart* v. *Excess Ins. Co.*, 316

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[2] Granite State attempts to bootstrap federal jurisdiction through its contention that its insurance contract was a maritime contract subject to federal law. The Fifth Circuit disposed of this argument as follows:

> We note, however, that it is at least arguable that the Endorsement sued upon is not maritime, or if so, is a mixed contract, in either of which cases state law would likely be applicable. Even if it is an admiralty contract, certain state law insurance principles are applicable. *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S. Ct. 368 (1955). The characterization of the insurance Endorsement alone does not invoke the interests of uniformity for admiralty purposes that would require a federal forum. Granite State's argument therefore does not detract from the stay order.

(Op. at 7, n. 6).

U.S. 491, 62 S. Ct. 1173, 86 L.Ed. 1620 (1942). Under *Brillhart*, the district court should not ordinarily exercise its discretion to hear declaratory judgment actions where there is another suit between the parties pending in state court that presents the same issues, not governed by federal law.

The Court's rationale in *Brillhart* had three principal bases: 1) avoidance of having federal courts needlessly determine issues of state law; 2) discouraging litigants from filing declaratory judgment actions as a means of forum shopping; and 3) avoiding duplicative litigation. As indicated above, all of these factors are present here.

Granite State is correct insofar as some circuits use *de novo* review rather than an absence of discretion standard. In spite of the different standards, there is no practical difference in the result. The fact that the other circuits, regardless of the standard applied, would have affirmed the stay order is demonstrated by Granite State's own authority.

Four of the five cases cited by Granite State that review abstention *de novo* in declaratory judgment actions (Petition at 7) support Tandy's position, because in them the court of appeals ordered abstention. *Continental Cas. Co.* v. *Robsac Indus.*, 947 F.2d 1367 (9th Cir. 1991); *Allstate Ins.* v. *Mercier*, 913 F.2d 273 (6th Cir. 1990); *International Harvestor Co.* v. *Deere & Co.*, 623 F.2d 1207 (7th Cir. 1980); *Hanes Corp.* v. *Millard*, 531 F.2d 585 (D.C. Cir. 1976). In each of these cases, the district court had actually assumed jurisdiction over the declaratory judgment and the appellate court reversed the district court's refusal to abstain.

Only one of the cases relied upon by Granite State actually resulted in abstention. In that case, the determination that abstention was improper hinged on a factor not present here. In *Cincinnati Ins. Co.* v. *Holbrook*, 867 F.2d 1330, 1333 (11th Cir. 1989), state law provided no adequate remedy. State law would not have allowed resolution of a declaratory judgment until the

underlying claim had been resolved. Here, state law provides an adequate remedy.

The consequence of Granite State's argument in this case is that if an insurance company decides to bring its insured to an inconvenient forum, it can do so by racing to the courthouse with a declaratory judgment action. Regardless of the degree of bad faith in which that action is brought, the district court would have little or no discretion over whether to hear it. That is the reasoning by which Granite State urges the conflict. That is not the law.

II. Even if *Colorado River* and *Moses H. Cone* factors apply, the trial court properly balanced those factors to refuse to exercise its jurisdiction.

Granite State also argues that the Fifth Circuit should have applied *Colorado River* and *Moses Cone* factors to determine whether the stay was proper. Even applying the factors set out in these cases, the district court properly determined to refuse to exercise jurisdiction. For this additional reason, this case is not appropriate for consideration by this Court.

Under *Colorado River* and *Moses H. Cone*, this Court set out the following factors in determining whether to abstain from hearing a case due to the pendency of a similar state court action:

(1) the avoidance of exercise of jurisdiction over particular property by more than one court;

(2) the inconvenience of the federal forum;

(3) the desirability of avoiding piecemeal litigation;

(4) the order in which jurisdiction was obtained by the concurrent forums;

(5) the applicability of federal or state law to the merits of the claims at issue; and

(6) the adequacy of the state court proceedings to protect the rights of the party that invoked the federal court's jurisdiction.

Moses H. Cone Memorial Hospital v. *Mercury Construction Corp.*, 460 U.S. 1, 15-16, 103 S. Ct. 927, 74 L. Ed. 765 (1983); *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 818, 96 S. Ct. 1236, 47 L. Ed. 483 (1976).

The district court addressed these factors. To the extent they apply, they overwhelmingly support abstention. (Order at 8; R.I, 203).

A. The second factor, inconvenience of the federal forum, supports the district court's decision to decline to hear the case. The district court explained its application of this factor as follows: "Even considered in the light most favorable to [Granite State], this court does not represent the most convenient forum for the parties." (Order at 8, 9; R.I., 203-204).

All of the parties are incorporated and have their principal places of business in different locations — all distant from this forum. (Order at 8, 9). The district court noted:

> If, as [Granite State's] attorneys have suggested, the instant suit represents a "case between principals," then most of the witnesses germane to this dispute are located outside of this district. Likewise, most of the documentary evidence related to this dispute would be found not within this district but at the parties' corporate offices, which are located outside this district. Because at least one of the parties and numerous documents and witnesses relevant to this dispute are located in Tarrant County, the venue of the state court action would ameliorate the overall burdens of litigation on the instant parties.

(Order at 8, 9; R.I, 203-204). This factor was never challenged and is binding on Granite State.

B. The factor concerning the danger of piecemeal litigation also weighs in favor of abstention. As the district court wrote, Tandy could conceivably proceed to trial on its claims against Granite State and thus force Granite State to litigate some if not all of its claims regarding coverage. (Order at 9). The administration of justice would be better served if all the potential disputes resulting from Tandy's claim were resolved in one suit.

C. The fourth factor, the order in which jurisdiction was obtained by the concurrent forms, also favors abstention. The district court found that Granite State brought this suit to forestall a foreseeable state court suit by Tandy. (Order at 9, 10).

D. The additional factor of absence of progress in the federal litigation supports abstention. In the federal case, there had been virtually no progress. Tandy had not taken any action other than to file an answer, the motion for abstention, and related briefs, and Granite State has merely filed its complaint and response to the defendants' motion. (Order at 10).

E. Finally, the state court proceedings adequately protect Granite State's rights. The district court determined that:

> [Granite State] has not shown that it would be unable to pursue the claims that it presses in this Court in the Tarrant County proceeding.

(Order at 11).

Accordingly, even if *Colorado River* and *Moses H. Cone* apply, the district courts properly applied the factors for consideration of whether a federal court should abstain from hearing a case due to a pending state court action. The court's findings under those factors meet the bases for abstention set out in *Colorado River* and *Moses H. Cone*.

Thus, there is no conflict with any decision of this Court or with any decision of any other circuit. Granite State presents no question that merits this Court's review.

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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PETITIONER'S

BRIEF

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

I. May a federal court that clearly has jurisdiction over a declaratory judgment action in a case brought pursuant to federal law abstain from exercising that jurisdiction in light of a later-filed action in a state court?

II. Should a district court's abstention decision in a declaratory judgment context be reviewed *de novo* by the court of appeals?

III. Did the district court and the court of appeals err in failing to consider the unflagging obligation to exercise jurisdiction and the applicability of federal maritime law to this declaratory judgment dispute?

LIST OF PARTIES

The parties to the proceedings below are Granite State Insurance Company, Tandy Corporation and T.C. Electronics (Korea) Ltd.

Parallel litigation filed by Tandy in Texas state court involves the following parties:

1. Tandy Corporation
2. Granite State Insurance Company
3. American International Marine Adjusters, Inc.
4. Insurance Company of the State of Pennsylvania
5. American International Underwriters Corporation
6. Alexander & Alexander of Texas, Inc.
7. Utica Mutual Insurance Company.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals for the Fifth Circuit denying rehearing and rehearing en banc is not reported, but is reprinted at Pet. for Cert. App. A-1.[1]

The opinion of the court of appeals for the Fifth Circuit is not reported, but is reprinted at Pet. for Cert. App. B-1.

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[1] The Appendix to the Petition for Writ of Certiorari is cited as "Pet. for Cert. App. ___." The Joint Appendix filed with this Brief on the Merits is cited as "J.A. ___."

The opinion of the District Court for the Southern District of Texas is reported at 762 F.Supp. 156 (S.D. Tex. 1991) and is reprinted at Pet. for Cert. App. C-1.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1988). The court of appeals for the Fifth Circuit rendered its decision on March 30, 1992. A suggestion for rehearing en banc was filed on April 13, 1992 and denied on May 1, 1992. A petition for writ of certiorari was timely filed on June 26, 1992; this Court granted certiorari on October 5, 1992.

This case was originally filed in the United States District Court for the Southern District of Texas under federal maritime jurisdiction, 28 U.S.C. § 1333 (1988), and diversity jurisdiction, 28 U.S.C. § 1332 (1988), seeking relief under the Declaratory Judgment Act, 28 U.S.C. § 2201(a) (1988). This case was appealed to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. §§ 1292(a)(3) and 1291 (1988).

STATUTES INVOLVED

United States Constitution, art. III, § 2[1].

> The judicial Power [of the United States] shall extend . . . to all cases of admiralty and maritime jurisdiction . . . [and] between Citizens of different states. . . .

28 U.S.C. § 2201(a) (1988). Declaratory Judgment Act.

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

This appeal arises out of a dispute between Tandy Corporation ("Tandy") and Granite State Insurance Company ("Granite State") over a $10 million claim asserted by Tandy as the assured under a Granite State ocean marine cargo policy. Granite State filed this suit, seeking a declaration that the federal maritime doctrine of *uberrimae fidei*[2] rendered the insurance policy void from its inception due to Tandy's material misrepresentations and nondisclosures. Jurisdiction was based on admiralty because of the maritime character of the insurance policy and on diversity. Granite State is a New Hampshire corporation with its principal place of business in New Hampshire. Tandy is a Delaware corporation with its principal place of business in Tarrant County, Fort Worth, Texas.

[2] The federal maritime doctrine of *uberrimae fidei* requires that both parties to a marine insurance contract act with the utmost good faith in all dealings relating to the policy.

Although headquartered in Texas, Tandy, through a Korean subsidiary, operated an electronics plant at Masan, South Korea. Tandy closed the plant due to labor unrest on March 6, 1989, and placed its Korean subsidiary into liquidation on March 31, 1989. On April 6, 1989, striking Tandy workers overran the plant, and forcibly shut out the liquidator. (Pet. for Cert. App. A-4; J.A. 10). On April 11, 1989, striking workers kidnapped the former president of the Masan factory, held him hostage and threatened to murder him if Tandy did not accede to the workers' demands. These facts are essentially uncontested. (*See* Tandy's Response to Petition for Writ of Certiorari, p. 2; Tandy's Brief to Fifth Circuit, p. 3).

In the midst of this turmoil, on April 26, 1989, Tandy solicited from Granite State a bid for Marine Open Cover Cargo Insurance. This coverage was to insure Tandy for physical damage to its property during world-wide transportation. During policy negotiations, Tandy told Granite State that similar insurance was then in place, including an endorsement which extended coverage to inventory, work-in-progress and raw materials at Tandy's factories and warehouses in various Asian countries, including South Korea. (J.A. 6-7). Tandy specifically asked Granite State for this same endorsement.

Marine cargo policies traditionally exclude damage caused by strikes, riots and civil commotions ("SR&CC coverage"). This coverage can be "bought back" into the policy by endorsement. Tandy specifically requested that Granite State provide SR&CC coverage.

At no time during the negotiations did Tandy inform Granite State of the takeover of the Masan plant, or that

any property to be insured under the new policy was no longer under Tandy's control, but subject to the whims of Tandy's striking labor force. To the contrary, Tandy expressly represented that "there have been no losses at any of the warehouse/assembly operations." (J.A. 15-16). Granite State bid on the requested coverage, relying on Tandy's representations, and ultimately was chosen to write Tandy's marine cargo insurance. Coverage was bound effective June 22, 1989, and included the inland endorsement and the SR&CC coverage that Tandy sought.

In January 1990, Granite State received its first notice of a loss at the Masan plant. (J.A. 17). Within days, Granite State learned of the March 1989 occupation and of damage to some insured property before coverage was sought. Moreover, Granite State learned that there had been repeated acts of violence and possibly theft of insured property from the Masan plant throughout 1989. Tandy regained control of the Masan plant on December 21, 1989 after Korean riot police stormed the building and arrested the former workers. Tandy did not report the takeover, riot or damage caused by the riot, as maritime insurance practice and the terms of the policy required, until January 12, 1990. By that time, Tandy's liquidator had removed all desired assets and sold the remaining property, including perhaps $5 million in undamaged insured inventory, to a scrap dealer. By the end of January 1990, Tandy informed Granite State that the loss approached the $10 million policy limits.

On February 2, 1990, Granite State sent Tandy a letter reserving rights and defenses arising out of non-disclosure of material facts, possible misrepresentations,

failure to give timely notice, and possible other insurance. In that letter, Granite State advised Tandy that an investigation would be required into both the placement of the insurance and the amount of the loss. (J.A. 83-89).

Between March and December 1990, Granite State tried on numerous occasions to get information from Tandy about the specific elements of the loss. Granite State's independent investigation revealed that most of Tandy's "damage" was economic loss, not covered by Granite State's policy, and that the insured physical loss was estimated by Tandy's own liquidator and accountants to be less than $100,000. (ROA Vol. 2, 31-50).[3] On November 28, 1990, Tandy sent Granite State a one-page printed form proof of loss, without supporting documentation, seeking the full $10 million policy limits. (J.A. 99-103). Granite State told Tandy that this was inadequate proof and reiterated its earlier requests for information. (J.A. 104-105). Tandy responded but provided very little new information. Additionally, Tandy informed Granite State that it would provide no further information. (ROA Vol. 2, 49-51).

Despite its good-faith efforts, Granite State was unable to evaluate coverage or the extent of Tandy's actual damages. The information that Granite State did obtain indicated significant coverage problems. Rather than decline coverage and risk the inevitable punitive damage claim in the insured's home forum, Granite State filed this action in a neutral forum, seeking a declaration of its rights, specifically a determination under federal

[3] Record references are cited as "ROA ___".

maritime law of the validity of the marine insurance policy *at its inception*.

Granite State based its claim on (i) Tandy's failure to disclose facts material to the coverage; *i.e.*, the history of violent labor unrest and that some insured property was being held hostage by Tandy's striking workers; and (ii) Tandy's active misrepresentation of certain facts; *i.e.*, that there were no losses to the property insured at the time the policy became effective, when, in fact, there was a loss in progress. (J.A. 20-21). Consequently, Granite State sought a declaration that the marine insurance policy was void *ab initio* under the maritime doctrine of *uberrimae fidei*. This suit was filed to obtain a judicial interpretation of policy validity, and specifically, to avoid the dire consequences under Texas law for wrongfully denying coverage.

Less than a month after this declaratory judgment action was filed, Tandy sued Granite State in Texas state court, seeking actual damages of $10 million (the policy limits), plus exemplary and punitive damages.[4] Tandy filed suit in the state court of Tarrant County, Fort Worth, Texas where Tandy has its principal place of business, and where Tandy is one of the largest employers in the county.[5]

[4] Tandy's amended state court suit seeks $10 million in actual and $100 million in punitive damages.

[5] Also named as defendants in the state court action were the various agents of both Tandy and Granite State, as well as Tandy's prior marine cargo insurance company.

Tandy then filed a motion to dismiss or stay this action, pending resolution of the later-filed state court action. The district court granted Tandy's motion, and ordered this litigation stayed. The district court based its abstention decision on two principal factors: (i) the pendency of the state court action and the attendant possibility of piecemeal litigation, and (ii) Granite State's alleged "race" to the courthouse, filing suit in anticipation of Tandy's expected litigation. (Pet. for Cert. App. C-4 to C-5).

The district court engaged in a cursory review of some of the abstention factors set out in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). (Pet. for Cert. App. C-5 to C-9). The district court did not, however, as directed by *Colorado River* and *Moses Cone*, consider its "unflagging obligation" to exercise jurisdiction, or heavily weigh all factors in favor of the exercise of jurisdiction. Moreover, the district court did not identify any "exceptional circumstances" that would justify abstention and wholly failed to consider that federal maritime law, not state insurance law, governs the issues raised in this litigation.

The court of appeals affirmed. It held that *Colorado River* and *Moses Cone* do not apply to declaratory judgment actions. (Pet. for Cert. App. B-3 to B-4). In so holding, the Fifth Circuit ignored the "virtually unflagging obligation" to exercise jurisdiction absent "exceptional circumstances." Believing that Declaratory Judgment Act

decisions are committed to the district court's sound discretion, the Fifth Circuit refused to set aside the district court's stay order. (Pet. for Cert. App. B-7).

SUMMARY OF ARGUMENT

This is a maritime action, involving principles of federal maritime law, filed under a procedure created by Congress to resolve disputes just like this one. The district court's refusal to allow Granite State its day in federal court was error, and should be reversed.

"[F]ederal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred . . . [and] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." *New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 358, 109 S.Ct. 2506, 2512, 105 L.Ed.2d 298, 310 (1989) (quoting *Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821)). The central question in this appeal is whether a district court may defer to a later-filed state court action, simply because the state court has equal authority to resolve the issues presented. Granite State properly invoked federal jurisdiction, seeking a remedy affirmatively guaranteed by Congress in the Declaratory Judgment Act ("the Act"). The lower courts have denied Granite State both its right to be in federal court, and the remedy which Congress has affirmatively supplied, ignoring legislative intent, and violating the constitutionally mandated separation of powers between the legislature and the judiciary.

The Declaratory Judgment Act is intended to permit litigants an opportunity for judicial intervention before uncertainty regarding rights and obligations escalates into an affirmative breach of duty. Neither the Act itself, nor anything in its legislative history, permits a court having jurisdiction over the parties and issues to decline to hear a declaratory judgment suit. The district court's decision to defer to a parallel state court action violates the purpose of the Act, and the clear intent of its framers.

District courts have certainly not been afforded discretion to decline declaratory judgment cases, merely because it is more convenient to do so. The history of the Act, and its remedial nature, require federal courts to provide litigants their day in court. At the end of the day, if the declaratory relief will not resolve the controversy, district courts may decline to order the requested relief. If a federal court has valid jurisdiction over a declaratory judgment case, that jurisdiction must be exercised. Any other result would permit the judicial usurpation of the legislative prerogative, and unconstitutionally infringe on the legislative branch.

If district courts are permitted any discretion under the Act, that discretion can only be exercised in light of the court's unflagging obligation to exercise jurisdiction. Only exceptional circumstances will justify abdication of valid jurisdiction. *See Deakins v. Monaghan*, 484 U.S. 193, 203, 108 S.Ct. 523, 530, 98 L.Ed.2d 529, 540 (1988) (quotations omitted); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 237-39, 104 S.Ct. 2321, 2327-28, 81 L.Ed.2d 186, 195-96 (1984); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19, 103 S.Ct. 927, 938, 74 L.Ed.2d 765, 782 (1983); *Colorado River Water Conservation Dist. v.*

United States, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483, 495-96 (1976); *County of Allegheny v. Frank Mashuda Corp.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1062-63, 3 L.Ed.2d 1163, 1166 (1959).

Neither the invocation of an affirmative federal remedy nor the pendency of a state court proceeding is an exceptional circumstance that justifies the abdication of valid federal jurisdiction. In fact the opposite is true. Abstention merely because Granite State can be sued in state court creates a precedent that extends far beyond the facts of this case, depriving litigants of a right and a remedy guaranteed by Congress: the right to seek resolution of claims in a neutral federal forum. Abstention because Granite State invoked a legislatively sanctioned remedy in the Declaratory Judgment Act unconstitutionally usurps the legislative prerogative, and judicially repeals the Act itself. While exceptional circumstances might constitutionally justify abdication of the unflagging obligation to exercise jurisdiction, the judiciary may not eviscerate an affirmative remedy solely because it is more convenient to do so. Unless exceptional circumstances are present – and none were identified by the district court – abstention from a declaratory judgment action cannot be permitted. Such a result violates the separation of powers doctrine embodied in the United States Constitution. U.S. CONST. arts I-III.

The decision to abstain, though based on the facts of a particular case, is a purely legal determination. Review of that decision, therefore, must be based on a searching examination *de novo*. Moreover, the importance of federalism and comity concerns require a searching review from the courts of appeals. *See Brillhart v. Excess Ins. Co.*, 316

U.S. 491, 494, 62 S.Ct. 1173, 1175, 86 L.Ed. 1620, 1625 (1942). A district court cannot be permitted unfettered discretion to abrogate its responsibility to decide cases that are clearly within federal jurisdiction. *Moses Cone*, 460 U.S. at 19, 103 S.Ct. at 938. Furthermore, deference to a later-filed state court action elevates comity over federalism, ignoring the affirmative nature of the remedy provided by Congress.

The district court failed to consider governing law, and completely failed to weigh all abstention factors in light of the unflagging obligation to exercise jurisdiction. The Fifth Circuit's deference to the unfettered discretion of the district court has effectively obliterated a legislatively crafted remedy for Granite State in particular, and for insurers in general. The district court's "second in time preference" eliminates the efficacy of the Declaratory Judgment Act and penalizes any litigant who attempts to avail itself of the protections of the Declaratory Judgment Act before a dispute ripens into litigation. The district court below had clear and unquestioned jurisdiction over Granite State's declaratory judgment action. Abstention in favor of a later-filed state court action can be justified, if at all, only in extraordinary circumstances. The courts below identified no extraordinary circumstances, because none exist. This case should be remanded to provide Granite State its day in federal court.

ARGUMENT

I. A federal court with valid jurisdiction may not defer to a later-filed state court action, merely because of the pendency of the state court action.

This case presents the Court with the opportunity to resolve conclusively what has become an increasingly tangled web of confusing and conflicting decisions issued by the circuit courts. In clear conflict with the majority of circuits which have addressed this issue,[6] the Fifth Circuit has given district courts discretion to dismiss matters validly before the federal court, solely for the sake of convenience, if a state forum is available and competent to resolve the issues presented. If a district court has virtually unfettered discretion to stay an action properly within its jurisdiction, solely because a parallel action has been filed in a state court having concurrent jurisdiction, then the only way Congress can assure a litigant the right to choose a federal forum is to grant federal courts *exclusive* jurisdiction. The Fifth Circuit's ruling eviscerates the affirmative remedy provided by Congress in the Declaratory Judgment Act and ignores the clear congressional intent to provide litigants with a neutral federal forum to

[6] *See Villa Marina Yacht Sales v. Hatteras Yachts*, 915 F.2d 7, 13 (CA1 1990); *General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988); *GEICO v. Simon*, 917 F.2d 1144, 1147-49 (CA8 1990); *University of Maryland v. Peat Marwick Main & Co.*, 923 F.2d 265, 271 (CA3 1991); *Heitmanis v. Austin*, 899 F.2d 521, 527 (CA6 1990); *Life-Link Int'l, Inc. v. Lalla*, 902 F.2d 1493, 1495 (CA10 1990); *American Mfrs. Mut. Ins. v. Edward D. Stone, Jr.*, 743 F.2d 1519, 1525 (CA11 1984). *But see Continental Casualty Co. v. Robsac Indus., Inc.*, 947 F.2d 1367, 1370 (CA9 1991).

resolve issues such as those presented here. The decision below should be reversed.

A. Deference to a later-filed state court action is contrary to congressional intent and the affirmative character of the Declaratory Judgment Act.

The courts below held that the exercise of jurisdiction under the Declaratory Judgment Act is discretionary. That was error. The legislative history of the Act makes it clear that federal courts have no discretion to decline to hear a Declaratory Judgment action, but must allow litigants an opportunity to be heard. *See* S. Rep. No. 1005, 73d Cong., 2d Sess., at 5-6 (1934); H.R. Rep. No. 1264, 73d Cong., 2d Sess., at 2 (1934). Deference in favor of a later-filed state court action is contrary to the affirmative intent of the Act, and the clear dictates of the framers of the statute. District courts *must* hear Declaratory Judgment cases; district courts *may* decline to enter the requested relief. Granite State is entitled to its day in court, and the opportunity to present its case in a neutral federal forum. *See* H.R. Rep. No. 627, 72d Cong., 1st Sess., at 2 (1932). The decision of the Fifth Circuit should be reversed, with instructions to vacate the district court's stay order.

The right of a declaratory judgment petitioner to have its day in court is absolute. "[W]hen a petitioner seeks a mild instead of a drastic remedy as adequate to his needs, *no court should deny it* unless it thinks the relief insufficient to the purpose of the suit. It should make no difference to a court through which door a petitioner

enters the court room, so long as he is properly there and the court is in a position to grant relief." EDWIN BORCHARD, DECLARATORY JUDGMENTS xi (2d ed. 1941) (emphasis added).[7] Once the litigants have been fully heard, then, and only then, does a district court have discretion to refuse to issue the relief sought, because it will not terminate the controversy or serve a useful purpose. *Id. See also* S. Rep. No. 1005, 73d Cong., 2d Sess., at 2, 5 (1934).

As visualized by its framers, the Declaratory Judgment Act was intended to be a progressive, affirmative protection for "the perplexed and insecure citizen," specifically in insurance disputes. EDWIN BORCHARD, DECLARATORY JUDGMENTS vii, 634-80 (2d ed. 1941). To effectuate this intent, district courts must give declaratory judgment litigants their day in court. Litigants have a right to maintain a suit under the Act to secure a judgment determining the obligations and liabilities of the parties. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 243-44, 57 S.Ct. 461, 465, 81 L.Ed. 617, 622-23 (1937).

Deference to a later-filed state court action, simply because another forum is available, is inconsistent with the affirmative, remedial character of the right granted by Congress. Congress has not given district courts discretion to dismiss cases, merely because it is more convenient to do so. Rather, district courts have discretion to grant the relief sought, or to deny the relief sought,

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[7] Professor Borchard, one of the earliest proponents of declaratory judgments, testified before the Senate Judiciary Committee in support of the passage of the Declaratory Judgment Act. S. Rep. No. 1005, 73d Cong., 2d Sess., at 2 (1934).

following a full trial on the merits. *See* S. Rep. No. 1005, 73d Cong., 2d Sess., at 2, 5 (1934).

Granite State, unsure of its rights and duties under its policy of marine cargo insurance, invoked the affirmative protection of the federal court. The district court's decision to stay, pending resolution of the later-filed state court action, has eviscerated the affirmative nature of the remedy provided to Granite State by Congress. The district court has effectively abolished the Declaratory Judgment Act, leaving Granite State without a federal remedy. The stay order must be vacated and Granite State permitted to proceed to trial.

B. Traditional abstention doctrine does not permit the abdication of jurisdiction over a declaratory judgment action merely because of the pendency of a parallel state court action.

The decisions of *Brillhart v. Excess Insurance Co.*, 316 U.S. 491, 62 S.Ct. 1173, 86 L.Ed. 1620 (1942), *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), reinforced by this Court's recent decisions in *McCarthy v. Madigan*, ___ U.S. ___, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992), and *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989), command a district court with valid jurisdiction to exercise that jurisdiction in declaratory judgment cases, except in the most exceptional circumstances. The mere pendency of a state court action is not sufficient.

Throughout the last fifty years, this Court has refined the abstention doctrine as it presents itself in various postures. Beginning with *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 84 L.Ed. 971 (1941), continuing with *Brillhart* and *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), the Court addressed the comity problems that arise when federal courts and state courts have concurrent, parallel jurisdiction over pending matters. These cases held that where important issues of state law are present, it may be appropriate for a federal court to stay its hand and allow the state courts to resolve issues of state law. *See also Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Where issues of federal law are present, however, and an affirmative federal remedy has been invoked, these traditional abstention doctrines do not permit a federal court to decline jurisdiction merely because of the pendency of a state court action. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). *Colorado River* presented a situation involving parallel state and federal actions, but no important issues of state law. The McCarran Act[8]

[8] The McCarran Amendment remains essentially the same. The present version provides: "consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit." 43 U.S.C. § 666 (1988).

provides state and federal courts with concurrent jurisdiction over water rights disputes on federal lands. The United States filed suit in federal court to adjudicate water rights on an Indian reservation. Shortly thereafter, a defendant sought to make the government a party to an action in a state water district, seeking to adjudicate the same water rights under the state regulatory scheme. The district court dismissed the government's suit on abstention grounds; the court of appeals reversed.

In reviewing the decision of the court of appeals, this Court canvassed existing manifestations of the abstention doctrine[9] and concluded that none of the three existing forms of abstention were applicable. Nonetheless, this Court reinstated the dismissal order under a new doctrine, by which a district court, in the interests of "wise judicial administration," could dismiss or stay a federal action in deference to a parallel state action. 424 U.S. at 817-18, 96 S.Ct. at 1246. This is, essentially, a doctrine of convenience for the federal courts. *See* Linda Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986). *"Colorado River"* abstention, while similar in practice to the existing abstention doctrines, is appropriate "in considerably more limited [circumstances] than the circumstances appropriate for abstention. [*Colorado River* abstention] circumstances, though exceptional, do nevertheless exist." *Colorado River*, 424 U.S. at 818, 96 S.Ct. at 1246.

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[9] *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496, 61 S.Ct. 643, 84 L.Ed. 971 (1941); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1942); *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Colorado River then identified some exceptional circumstances in which this type of abstention would be appropriate. (i) The court which first assumes jurisdiction over real property may exercise that jurisdiction to the exclusion of other courts. 424 U.S. at 818, 96 S.Ct. at 1246. (ii) Extreme inconvenience of the federal forum is another consideration that may argue in favor of this type of abstention. (iii) The desirability of avoiding piecemeal adjudications may support abstention; and (iv) the court may consider the order in which jurisdiction was obtained. 424 U.S. at 818, 96 S.Ct. at 1247. "No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counseling against that exercise is required. *Only the clearest of justifications will warrant dismissal.*" 424 U.S. at 818-19, 96 S.Ct. at 1247 (emphasis added) (citations omitted).

These factors were expanded to six by *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). Again emphasizing the "unflagging obligation" to exercise jurisdiction, and that only the clearest of justifications would warrant abdicating that jurisdiction, *Moses Cone* added to the abstention equation (v) choice of law, and (vi) inadequacy of the state court proceeding. 460 U.S. at 26, 28, 103 S.Ct. at 942-43.

Moses Cone was a declaratory judgment suit filed in federal court, seeking an order compelling arbitration of a contract dispute. The federal court action was the second-filed action, coming on the heels of a declaratory judgment action in state court. Both cases involved the identical issue of whether the claims presented should be

arbitrated. The district court stayed the federal declaratory judgment action pending resolution of the Hospital's state court suit because the issues were identical. 460 U.S. at 7, 103 S.Ct. at 932. The Fourth Circuit reversed and remanded with instructions to enter an order to arbitrate.

In addressing the propriety of the district court's stay order, this Court looked first to the "persuasive guidance" of *Colorado River*. 460 U.S. at 13, 103 S.Ct. at 935. After discussing *Colorado River*, and the new form of "abstention" it created, this Court determined that the *Colorado River* "exceptional circumstances" test provided the standard against which to review the district court's exercise of discretion in a federal declaratory judgment action. 460 U.S. at 19, 103 S.Ct. at 938.

Moses Cone makes it clear that declaratory judgment actions must be viewed with the same unflagging obligation to exercise jurisdiction as is required with all other types of actions validly within federal jurisdiction. If a district court is ever permitted to stay its hand, pending resolution by a parallel forum, a decision to stay must be made within the limits prescribed by *Colorado River* and *Moses Cone*. *See also New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 198 (1989) ("NOPSI") (reversing abstention decision where declaratory relief sought under federal law). Specifically addressing the issue of parallel actions in the state and federal systems, *NOPSI* recognized that while the federal court's disposition of an action may affect or pre-empt a pending state action, "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." 491 U.S. at 373, 109 S.Ct. at 2520.

If district courts are permitted under any circumstances to stay declaratory judgment cases, the decision must be made in light of the unflagging obligation to exercise jurisdiction, which cannot be abdicated absent exceptional circumstances. The mere pendency of a state court action is not an exceptional circumstance, but is a foregone conclusion in *Colorado River* abstention cases. Jurisdiction must be exercised in this declaratory judgment case.

C. Unless exceptional circumstances exist, *Colorado River* abstention violates the United States Constitution.

Colorado River abstention is essentially a doctrine of convenience. *See* Linda Mullenix, *A Branch Too Far*, 75 Geo. L.J. at 103. While this Court has affirmed the application of *Colorado River* abstention in certain circumstances, this type of abstention is not based on the same comity principles at stake in traditional abstention cases, which involve complex state regulatory schemes, or untested state court statutes. *Colorado River* abstention is concerned with "wise judicial administration;" in other words, management of the district court's docket. This type of abstention always involves parallel litigation, in which one party desires a neutral federal forum, and the other party seeks a favorable state court forum.

Federal jurisdiction is not discretionary. The Constitution has provided a federal forum for cases involving maritime disputes, and for cases involving disputes between citizens of different states. U.S. Const. art. III, § 1. Maritime jurisdiction insures uniform application of

maritime commerce regulations. Diversity jurisdiction provides a neutral forum to an out-of-state defendant, free from the local and political pressures which might affect state courts. CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS § 23, at 127-30 (1983). In the Declaratory Judgment Act, Congress has provided litigants with an affirmative remedy; a remedy that by its very nature invites proactive, pre-emptive litigation.

A decision to abstain under *Colorado River* because of the pendency of a later-filed parallel state court action, except in the most exceptional of circumstances, thwarts the legislative purpose behind the jurisdiction statutes and the Declaratory Judgment Act. Granite State, although invoking a legislatively sanctioned federal remedy, is forced to try its federal maritime claims in a state court. Respondents do not allege that the jurisdictional statutes invoked were improper or unconstitutional. Likewise, there is no indication that the Declaratory Judgment Act itself is improper or unconstitutional. Both the constitutionality of the Act and its numerous benefits to all classes of litigants are long-established. *See generally* EDWIN BORCHARD, DECLARATORY JUDGMENTS (2d ed. 1941). Nonetheless, the district court's decision to abstain has abolished both Granite State's right and remedy. This judicial usurpation of the legislative function cannot be tolerated, if at all, absent the most exceptional circumstances.

D. The clear mandates of Congress and this Court direct federal district courts to exercise their valid jurisdiction, and resolve declaratory judgment cases, absent exceptional circumstances.

Over the last fifty years, this Court has refined the judicial doctrine of abstention as it presents itself in various manifestations. Throughout its history, the abstention doctrine has been "grounded firmly in considerations of comity and the maintenance of appropriate state-federal relations. . . . [T]he Court's concern for the maintenance of appropriate state court relations furnishes the underlying rationale for abstention." David Sonnenshein, *Abstention: The Crooked Course of Colorado River*, 59 TUL. L. REV. 651, 655-57 (1984). In almost every case involving parallel litigation, this Court has emphasized the "virtually unflagging obligation" to exercise jurisdiction, absent extraordinary circumstances. *See McCarthy v. Madigan*, ___ U.S. ___, 112 S.Ct. 1081, 1087, 117 L.Ed.2d 291 (1992); *NOPSI*, 491 U.S. at 359, 109 S.Ct. at 2513; *Deakins v. Monaghan*, 484 U.S. 193, 203, 108 S.Ct. 523, 530, 98 L.Ed.2d 529, 540 (1987); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571, 103 S.Ct. 3201, 3216, 77 L.Ed.2d 837, 859 (1983). Traditional abstention doctrine addresses grave concerns of federalism and comity. If a district court is ever permitted to abstain in a declaratory judgment action in deference to a state court, it can only do so where exceptional circumstances exist.

State courts have no particular comity interest in resolving a federal maritime dispute between two international companies over a loss which occurred in Korea.

The comity concerns which validate traditional abstention decisions are not present here. Absent a strong state interest in resolving a particular dispute, there is no justification for a federal court to stay its hand and permit a state forum to resolve issues first presented to the federal court, involving issues of maritime law. The remedial nature of the Declaratory Judgment Act requires federal courts to provide litigants an opportunity to present their case in a neutral federal forum.

If a federal court is ever permitted to decline a case, validly within federal jurisdiction, the importance of both federalism and comity concerns require that district courts engage in a careful analysis of the factors set out by this Court in *Colorado River* and *Moses Cone*. Most specifically, district courts must consider their unflagging obligation to exercise jurisdiction, and the affirmative nature of the declaratory remedy. The availability of a state forum is not an exceptional circumstance, and the district court identified no other reason for abstention. The district court below had unquestioned jurisdiction, and Granite State validly invoked an affirmative federal remedy in the Declaratory Judgment Act. The failure of the lower courts to analyze this case within the context of this Court's mandate that the exercise of jurisdiction is unflagging, requires reversal.

II. The importance of the comity and federalism issues presented by declaratory judgment abstentions requires *de novo* review by appellate courts.

The Fifth Circuit's decision to defer to the unfettered discretion of district courts eviscerates the affirmative

remedy provided by the Declaratory Judgment Act, in contravention of the express dictates of Congress, and in violation of the separation of powers doctrine embodied in the United States Constitution, and forever disables insurers from obtaining declaratory relief in federal courts. *See Continental Casualty Co. v. Robsac Indus.*, 947 F.2d 1367, 1377 (Hall, J., dissenting). The Fifth Circuit, in accord with the Second Circuit, has held that "the district court's handling of the declaratory judgment complaint is reviewed for abuse of discretion." (Pet. for Cert. App. B-4). *See General Reinsurance Corp. v. Ciba-Geigy Corp.*, 853 F.2d 78, 81 (CA2 1988).

This deferential review conflicts with decisions of the majority of circuits that have addressed this issue,[10] and effectively obliterates the affirmative remedy provided by Congress in the Declaratory Judgment Act. The importance of the comity and federalism issues presented by abstention cases requires that the exercise of discretion by district courts be carefully scrutinized on appeal. *See, e.g., Cincinnati Ins. v. Holbrook*, 867 F.2d 1330, 1333 (CA11 1989); 6A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶57.08[2] (2d ed. 1992). Furthermore, the abstention doctrine, unless carefully executed, infringes on the legislative process granted by the Constitution exclusively to the legislative branch. U.S. CONST. art. I, § 1 District

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[10] *See Continental Casualty Co. v. Robsac Indus.*, 947 F.2d 1367, 1370 (CA9 1991); *Allstate Ins. Co. v. Mercier*, 913 F.2d 273, 277 (CA6 1990); *Cincinnati Ins. v. Holbrook*, 867 F.2d 1330, 1333 (CA11 1989); *International Harvester Co. v. Deere & Co.*, 623 F.2d 1207, 1217 (CA7 1980); *Hanes Corp v. Millard*, 531 F.2d 585, 591 (CADC 1976); *see also GEICO v. Simon*, 917 F.2d 1144, 1147-49 (CA8 1990).

courts cannot be given unfettered discretion to ignore the clear dictates of Congress. The Fifth Circuit's failure to review searchingly the district court's decision requires reversal.

The Fifth Circuit has permitted district courts to decline to hear any matter that is within the concurrent jurisdiction of both state and federal courts, merely because the state court could more conveniently resolve issues presented. The precedent set by the court of appeals has far-reaching applications to admiralty matters, diversity cases, civil rights suits and any other matter that falls within the concurrent jurisdiction of state and federal courts, and has completely disenfranchised insurers from federal relief. *See Continental Casualty*, 947 F.2d at 1377 (Hall, J., dissenting).

If district courts have the broad discretion allowed by the Fifth Circuit, there is no end to the types of cases which can be dismissed because of a pending state court matter. A validly removed suit could be dismissed, because the plaintiff refiles the same lawsuit in state court, adding a non-diverse defendant to defeat removal. Under the Fifth Circuit's rule, the federal lawsuit could be stayed, pending resolution of the state court action. *See* Rex E. Lee & Richard G. Wilkins, *An Analysis of Supplemental Jurisdiction and Abstention with Recommendation for Legislative Action*, 1990 B.Y.U. L. Rev. 321, 371. This result, totally defeating federal jurisdiction, would be permitted in the Fifth Circuit. This cannot be the intent of Congress in providing both jurisdiction and affirmative relief.

While the Declaratory Judgment Act vests federal courts with discretion,[11] "such discretion must be exercised under the relevant standard prescribed by this Court." *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19, 103 S.Ct. 927, 938, 74 L.Ed.2d 765, 782 (1983). "The right of a party plaintiff to choose a federal court where there is a choice cannot properly be denied." *NOPSI*, 491 U.S. at 359, 109 S.Ct. at 2513 (citations omitted). The Fifth Circuit's deferential review conflicts with this Court's mandate that federal courts have a virtually unflagging obligation to exercise congressionally mandated jurisdiction. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483, 498 (1976). Abstention decisions must be given searching review if they are not to "make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *NOPSI*, 491 U.S. at 368, 109 S.Ct. at 2518 (citing, *inter alia*, *Colorado River*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483).

The separation of powers doctrine requires the judicial branch of the federal government to give due deference to the clear dictates of the legislative branch. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 319-20, 105 S.Ct. 3180, 3188, 87 L.Ed.2d 220, 232 (1985). As dictated by the Constitution, the legislature enacts statutes and regulations. The judiciary enforces

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[11] [A]ny court . . . *may* declare the rights and other legal relations. . . . " 28 U.S.C. § 2201(a) (1988) (emphasis added).

those rules and regulations within the limits of the Constitution and pursuant to the jurisdiction given by Congress. Because the courts are required to exercise their jurisdiction, a doctrine which permits district courts unfettered discretion is "treason to the Constitution." *See NOPSI*, 491 U.S. at 358, 109 S.Ct. at 2512. District courts may not cavalierly cast aside their responsibility to resolve matters within their jurisdiction. The decision of the Fifth Circuit must be reversed, with appropriate instructions for adequate analysis of these important issues of comity and federalism.

III A searching review of the *Colorado River/Moses Cone* factors reveals no exceptional circumstances and mandates the exercise of jurisdiction.

Neither the district court nor the Fifth Circuit identified any exceptional circumstances that would justify deference to the parallel state proceeding – nor did either court address the critical choice of law issue. Furthermore, the district court failed to weigh any factors in light of the unflagging obligation to exercise jurisdiction. Had the district court engaged in the correct analysis, it could not have concluded that a stay order was appropriate. The district court's factual analysis was erroneous and its ultimate conclusion untenable as a matter of law. The decision below should be reversed, and this case remanded with instructions to vacate the stay.

A. Because this case does not involve real property, the first *Colorado River* factor directs the exercise of jurisdiction.

The first *Colorado River* factor, jurisdiction over real property, is not an issue in this case. The task of a federal court is "not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional circumstances,' the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Moses Cone*, 460 U.S. at 25-26, 103 S.Ct. at 942. In other words, the absence of a factor, such as jurisdiction over property, supports the exercise of jurisdiction, rather than the declination of jurisdiction. Because Granite State and Tandy are not disputing real property, the first abstention factor directs the exercise of federal jurisdiction.

B. Because minimal inconvenience does not justify abdication of jurisdiction in favor of a parallel state action, the second *Colorado River* factor directs the exercise of jurisdiction.

The second *Colorado River* factor concerns the convenience of the respective forums. 424 U.S. at 818, 103 S.Ct. at 1247. A heavy burden is placed on parties seeking dismissal for convenience sake. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed.2d 1055 (1947); *see also* David Sonnenshein, *Abstention: The Crooked Course of Colorado River*, 59 Tul. L. Rev. 651, 695 (1984). Minimal inconvenience is not an "exceptional circumstance."

Granite State is a New Hampshire corporation with its principal place of business also in New Hampshire. (J.A. 4, 108). Tandy is a Delaware corporation with its principal place of business in Fort Worth, Texas. (J.A. 4, 108). T.C. Electronics (Korea) Ltd. is a Korean corporation with its principal place of business in Masan, Korea. (J.A. 4, 108). The insurance policy covered the world-wide transportation of goods. The loss claimed by Tandy took place in Korea. The underwriting communications were between offices in Houston, Dallas and Fort Worth. While there are some witnesses in Fort Worth with material information, there are equal numbers of witnesses in California, New York, Houston, Dallas and the Far East. Tandy's counsel has an office in Houston; Granite State's counsel maintains a branch office in Dallas. Houston and Dallas-Fort Worth are major cities with more than adequate airline service.[12] *See Colorado River*, 424 U.S. at 823-24 n.6, 96 S.Ct. at 1249-50 n.6 (Stewart, J., dissenting).

Because Fort Worth and Houston are equally convenient to two multi-national corporations having a dispute over events which took place in Korea, convenience factors in this multi-national dispute do not justify abstention. The second abstention factor directs the exercise of jurisdiction.

[12] In fact, the Official Airline Guide shows in excess of fifty flights per day between Dallas-Fort Worth and Houston, and Southwest Airlines offers flights between Dallas and Houston every fifteen minutes during peak hours.

C. The third *Colorado River* factor directs the exercise of jurisdiction to vindicate the affirmative federal policy of the Declaratory Judgment Act.

The third *Colorado River* factor concerns the avoidance of piecemeal litigation. Duplicative litigation is an ever-present problem in a dual judicial system and, by definition, is always present in a *Colorado River* abstention case. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559-60, 103 S.Ct. 3201, 3210, 77 L.Ed.2d 837 (1983). The pendency of a state court action alone does not bar concurrent proceedings in a federal court. *NOPSI*, 491 U.S. at 373, 109 S.Ct. at 2520; *see also Colorado River*, 424 U.S. at 817, 96 S.Ct. at 1246. *Colorado River's* concern was not duplicative litigation, but piecemeal adjudication, in more than one court, of a concrete, finite *res:* water in the Colorado River. That concern is not present in this litigation.

Piecemeal adjudication may be required, however, where necessary to effectuate legislative policy. *Moses Cone*, 460 U.S. at 20, 103 S.Ct. at 939. In *Moses Cone*, this Court described the anomalous nature of the Federal Arbitration Act, which, while not creating independent federal-question jurisdiction, represented an important federal policy "to be vindicated by the federal courts where otherwise appropriate." 460 U.S. at 25 n.32, 103 S.Ct. at 942 n.32.

The Declaratory Judgment Act evinces a similar federal policy, to be vindicated wherever possible. While the Act cannot be used absent affirmative federal jurisdiction,

where jurisdiction is present, the Act expresses a congressional policy that cannot be denied. Declaratory judgment claims brought in federal court must be allowed to continue.

Furthermore, Granite State's dispute with Tandy can be severed from the remainder of Tandy's state court litigation, resolving this problem without the necessity of a stay. *See Moses Cone*, 460 U.S. at 21, 103 S.Ct. at 939. Granite State sued Tandy as one principal against another, each of which is responsible for the errors of its own agents. In its state court action, Tandy has sued six different parties, including agents of both Tandy and Granite State, Tandy's property insurer, and Tandy's prior cargo insurer. Granite State can completely resolve its concerns regarding the validity of the Granite State insurance policy in this federal litigation, and can do so quickly and expeditiously without the confusion and complication associated with five other parties.[13]

As a practical matter, following resolution of the state action, principles of *res judicata* and collateral estoppel will preclude relitigation of factual issues. The issues of federal law that Granite State sought to have adjudicated by a neutral federal court will conclusively be determined by the state court. *See Will v. Calvert*, 437 U.S. 655, 675-76, 98 S.Ct. 2552, 2563-69, 57 L.Ed.2d 504, 519-20 (1978)

[13] As this case presently stands, Tandy cannot fully resolve its own complaints in this federal litigation. However, there is nothing to prevent Tandy from filing third party complaints against the other parties, thereby consolidating all issues in the federal action. *See* 28 U.S.C. § 1367(a) (Supp. II 1990).

(Brennan J., dissenting); *see also* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 96, 97 (1984). This Court has noted its "fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court . . . can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." *England v. Louisiana Bd. of Medical Examiners*, 375 U.S. 411, 415, 84 S.Ct. 461, 464, 11 L.Ed.2d 440, 444-45 (1964) (*Pullman* abstention).

The Declaratory Judgment Act represents an affirmative federal policy of providing access to a neutral federal forum for the adjudication of claims within federal jurisdiction. In order to vindicate this policy, and permit Granite State its federal forum, the third abstention factor directs the exercise of jurisdiction.

D. Because Granite State filed its action first, exercising its pre-emptive prerogative under the Declaratory Judgment Act, the fourth *Colorado River* factor directs the exercise of jurisdiction.

The fourth *Colorado River* factor, order of filing, supports federal resolution of this dispute. Granite State filed its declaratory judgment action first. The district court turned this factor on its head and held that Granite State improperly "raced" to the courthouse. The district court's conclusion is wrong for two reasons. Granite State did not commence its action until nearly two years after Tandy's loss began with the occupation of its premises, and over a year after the riot at Masan. Nonetheless,

according to the district court, this factor all but mandated deference to the state court proceeding. (Pet. for Cert. App. C-9).

Second, and more basically, the whole purpose of allowing declaratory judgment actions is to permit parties to have their rights and remedies determined by a court *before* taking action. That is not a "race"; it is the deliberate choice Congress has allowed parties to a dispute.

The diversity statute was enacted to provide litigants with an alternative to the perceived hometown bias of state courts. CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS § 23, at 128 (1983). The Declaratory Judgment Act was enacted to permit a party to "pre-empt" litigation, before a dispute escalated to the point where litigation was inevitable. *Id.* § 100, at 670-71.

This case clearly demonstrates the need for both a declaratory remedy and protection from hometown bias. Tandy, one of the largest employers in Tarrant County, is seeking $110 million from a home-town jury. Granite State, as an insurance company, is already at a disadvantage. Both diversity jurisdiction and the Declaratory Judgment Act provide remedial, affirmative protections for litigants in Granite State's position. Nonetheless, Granite State finds itself jettisoned from its federal forum, forced to try its case in state court.

This cannot be the result intended by Congress. Where unquestioned federal jurisdiction exists, the Declaratory Judgment Act is designed to allow a party to invoke federal judicial intervention to determine the rights of the parties *before* another party files a lawsuit. *Id.*

The Act expresses a clear congressional intent to provide litigants access to a judicial forum to clarify their rights and duties before they must take action, in a federal forum when Congress so provides. *See* EDWIN BORCHARD, DECLARATORY JUDGMENTS xii (2d ed. 1941). Because Granite State filed suit first, the fourth abstention factor directs the exercise of jurisdiction.

E. Federal maritime law governs this matter, therefore the fifth abstention factor directs the exercise of federal jurisdiction.

The fifth abstention factor is governing law. *Moses Cone*, 460 U.S. at 23, 103 S.Ct. at 941. "[T]he presence of federal-law issues must always be a major consideration weighing against surrender." *Moses Cone*, 460 U.S. at 26, 103 S.Ct. at 942. The courts below failed to address the law governing this multi-national dispute.

Granite State contests policy validity under federal maritime law because Tandy misrepresented material facts in its application for marine insurance. (J.A. 5, 18). Granite State brought this lawsuit under the Declaratory Judgment Act, asserting jurisdiction pursuant to federal maritime law[14] and diversity.[15] Granite State seeks the construction of an ocean marine cargo insurance policy, involving world-wide transport of Tandy's goods. The policy's choice of law provision states: "All questions of liability arising under this Policy are to be governed by

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[14] 28 U.S.C. § 1333 (1988).

[15] 28 U.S.C. § 1331 (1988).

the law and customs of England, except in the United States and its possessions." (J.A. 57).

Under English law, *uberrimae fidei* is the controlling requirement in the formation of a marine insurance contract: "A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party." The Marine Insurance Act, 1906, 6 Edw., Ch. 41, § 17 (Eng.). The English statute requires that the "assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured. . . . If the assured fails to make such disclosure, the insurer may avoid the contract." *Id.* § 18.

Federal maritime law, particularly where marine insurance in concerned, follows the fortunes of English decisions, and is virtually identical to English law. *Queens Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493, 44 S.Ct. 175, 176, 68 L.Ed. 402, 404 (1924); *Calmar S.S. Corp. v. Scott*, 345 U.S. 427, 442-43, 73 S.Ct. 739, 747, 97 L.Ed. 1125, 1138 (1953); *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866, 870 (CA2 1985); *see also Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 694-95 (CA11 1984), *modified*, 779 F.2d 1485 (CA11 1986); *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 980-82 (CA5 1969); *Royal Ins. Co. of America v. Cathy Daniels, Ltd.*, 684 F.Supp. 786, 790 (S.D.N.Y. 1988); *Reliance Knight v. U.S. Fire Ins. Co.*, 651 F.Supp. 477, 481 (S.D.N.Y.), *aff'd.*, 804 F.2d 9 (CA2 1986); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 55-56 (2d ed. 1975). *But see Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 316-21, 75 S.Ct. 368, 371-74, 99 L.Ed. 337, 344-46 (1955); *Albany Ins. Co. v. Anh Thi Kiu*, 927 F.2d 882, 890 (CA5 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 279, 116 L.Ed.2d 230 (1991). Under federal maritime law the doctrine of *uberrimae fidei* controls the formation of the Granite State policy.

The presence of issues of federal law is critical to the abstention decision. *Moses Cone*, 460 U.S. at 26, 103 S.Ct. at 942. Because Granite State raised issues governed by federal maritime law, the fifth abstention factor directs the exercise of jurisdiction.

F. Because the federal court has greater expertise with the federal and international issues presented by this action, the state court cannot claim any advantage and the sixth abstention factor directs the exercise of jurisdiction.

The final factor identified in *Moses Cone* is the inadequacy of the state court proceeding. 460 U.S. at 26, 103 S.Ct. at 942. The purpose of this inquiry is "not to find some substantial reason for the *exercise* of federal jurisdiction by the district court; rather the task is to ascertain whether there exist 'exceptional circumstances,' the 'clearest of justifications,' that can suffice under *Colorado River* to justify the *surrender* of that jurisdiction." *Moses Cone*, 460 U.S. at 25-26, 103 S.Ct. at 942. This factor does not require that the state forum be *in*adequate, in order to exercise jurisdiction, for an inadequate state forum *mandates* the exercise of federal jurisdiction. 460 U.S. at 26, 103 S.Ct. at 942. Because state court competence and procedures are presumed adequate, an adequate state forum is not an "exceptional circumstance" mandating surrender of jurisdiction. *See Deakins v. Monaghan*, 484

U.S. 193, 203, 108 S.Ct. 523, 530, 98 L.Ed.2d 529, 540-41 (1988); *Stone v. Powell*, 428 U.S. 465, 493-94 n.35, 96 S.Ct. 3037, 3052 n.35, 49 L.Ed.2d 1067, 1087 n.35 (1976); *see also* Akhil R. Amar, *Parity as a Constitutional Question*, 71 B.U. L. Rev. 645, 646 (1991); Erwin Chemerinsky, Comment, *Ending the Parity Debate*, 71 B.U. L. Rev. 593, 602-03 (1991). Unless the state court is affirmately inadequate, in which case jurisdiction is mandated, this factor does not even enter the abstention balance.

However, the local bias concerns that resulted in the enactment of the diversity jurisdiction statute are present here, and indicate the importance of a neutral federal forum. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L. J. 71, 75 n.15 (1984). Tandy filed its state court action in Tarrant County, a county in which Tandy is one of the largest employers, and the county in which Tandy maintains its principal place of business. Unlike life-tenured federal judges, the state judge hearing these issues will have to stand for re-election, in a community in which Tandy exercises a great deal of influence.

In addition, the applicability of federal maritime law is also relevant. "[F]ederal courts have developed a vast expertise in dealing with the intricacies of federal law, while the state judiciary has, quite naturally, devoted the bulk of its efforts to the evolution and refinement of state law and policy. It would be unreasonable to expect state judiciaries to possess a facility equal to that of the federal courts in adjudicating federal law." Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 Yale L.J. 71, 75 n.15 (1984) (citations omitted). This is particularly true when the choice is

between a state court in land-locked Tarrant County, and a federal court that due to its location on the Texas Gulf Coast has a great deal of familiarity with federal maritime issues. *See* Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. Rev. 67, 90.

Finally, this case involves the probability of extensive foreign discovery, most of it in the Far East. The need to resort to international treaties governing foreign discovery indicates that state courts cannot claim any advantage over federal courts.

On balance, while state courts are capable of handling complex litigation, state court competence is not the question. Only if the state court is demonstrably *better* qualified to handle an action does this factor support abstention. If state and federal courts are equally competent, this factor does not present an exceptional circumstance justifying abstention. If, however, the federal court possesses a greater expertise with a particular area of law, or has more resources available to accommodate the special needs of the litigants, the exercise of jurisdiction is mandated. Because of the presence of issues of federal law, and the need for international discovery, the federal courts are better suited to resolve this matter. The sixth abstention factor directs the exercise of jurisdiction.

G. Because there are no exceptional circumstances which would justify surrender of jurisdiction in favor of a state forum, the district court erred as a matter of law in abstaining.

The Declaratory Judgment Act provides litigants with an affirmative federal remedy to be used before a

potential breach of contract ripens into an actual breach of contractual duty. *See Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28 (CA5 1989); *see also* S. Rep. No. 1005, 73d Cong., 2d Sess., at 3 (1934). The Declaratory Judgment Act traditionally has been a vehicle used by insurers to avoid the potentially severe ramifications of denying an insured's claim, when valid grounds for doing so were present. *See e.g., Continental Casualty Co. v. Robsac Indus.*, 947 F.2d 1367 (CA9 1991); *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599 (CA5 1983); *American Mfrs. Mut. Ins. v. Stone*, 743 F.2d 1519 (CA11 1984); *see also* CHARLES A. WRIGHT, LAW OF THE FEDERAL COURTS § 100, at 672 (1983); EDWIN BORCHARD, DECLARATORY JUDGMENTS 634-80 (2d ed. 1941).

This case illustrates perfectly the "Catch 22" situation in which insurers find themselves. Granite State's investigation revealed numerous coverage questions. Tandy failed to disclose that the insured property was in the control of striking workers, affirmatively stated that no losses had occurred, and then refused to produce evidence of the value of the lost or damaged property. Once Tandy presented Granite State with an unsupported claim, Granite State had three options: (i) decline coverage and face the inevitable bad-faith lawsuit in a Texas state court, (ii) abandon its rights under the policy and pay $10 million without question, or (iii) seek a declaratory judgment. Despite opting for the prudent course of seeking a declaration of rights under the policy, Granite State now finds itself without its congressionally gra ed federal remedy, defending against a $110 million claim in Texas state court.

The district court identified no exceptional circumstance which would justify abstention. The affirmative

nature of the remedy provided by Congress, coupled with the applicability of maritime law, and the absence of any exceptional circumstances, requires the federal court to give Granite State an opportunity to be heard. This matter should be remanded for trial.

CONCLUSION

The decisions below should be reversed, and this case remanded to the Fifth Circuit with instructions to vacate the district court's stay order.

Respectfully submitted,

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